

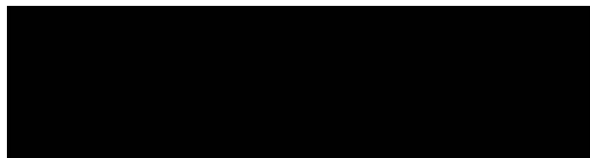
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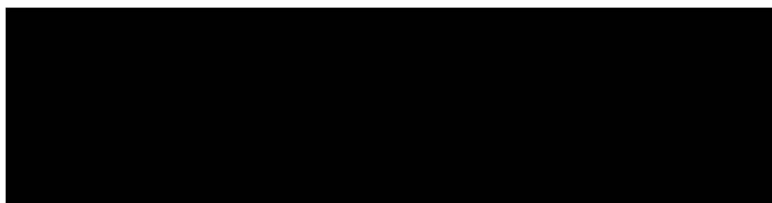


FILE: [REDACTED] Office: WASHINGTON DISTRICT Date: **JUN 10 2008**

INRE: Applicant: [REDACTED]

APPLICANON: Application for Status as Permanent Resident Pursuant to Section 13 of the Act of September 11, 1957, 8 U.S.C. § 1255b.

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Washington, D.C. and was appealed to the Administrative Appeals Office (AAO). The appeal was dismissed. The matter is now before the AAO on a motion to reopen. The motion will be granted. The prior decision will be affirmed.

The applicant is a native and citizen of the Peru who is seeking to adjust his status to that of lawful permanent resident under section 13 of the Act of 1957 ("Section 13"), Pub. L. No. 85-316, 71 Stat. 642, as modified, 95 Stat. 1611, 8 U.S.C. § 1255b, as an alien who performed diplomatic or semi-diplomatic duties under section 101(a)(15)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(A)(i).

The district director denied the application for adjustment of status after determining that at the time he applied for adjustment under Section 13, the applicant was still maintaining diplomatic status. *Decision of District Director*, dated May 18, 1999. The AAO concurred with the determination made by the district director and dismissed the applicant's appeal. *Decision of the MO*, dated April 8, 2003.

In requesting the AAO to reopen its decision, counsel asserts that the applicant retired from the Peruvian Embassy on August 1, 1992, prior to applying for adjustment of status on November 12, 1992, and that it is "patently unfair and a violation of [the applicant's] procedural due process rights" to deny him and his family adjustment of status based on the "the whim of a Department of State bureaucratic system which is subject to neither checks, balances nor review to ensure that embassy notifications are processed timely." Counsel submits a letter dated April 29, 2003 from Deputy Chief of Mission for the Embassy of Peru, in which _ indicates that the applicant retired from government service on August 1, 1992, and that his accreditation was terminated by the Department of State thereafter. Counsel also submits an affidavit from the applicant in which the applicant states that his employment ended at the Embassy of Peru upon his retirement on August 1, 1992. The applicant further states in the affidavit that he provided a different date in his prior sworn statement based on information he knew was contained in Department of State records, rather than on the actual date his employment ended.

The regulation at 8 C.P.R. § 103.5 requires that a motion to reopen state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. The present motion meets the requirements of 8 C.P.R. § 103.5. However, the prior decision of the AAO will be affirmed for the reasons stated below.

Section 13 of the Act of September 11, 1957, as amended on December 29, 1981, by Pub. L. 97-116, 95 Stat. 1161, provides, in pertinent part:

(a) Any alien admitted to the United States as a nonimmigrant under the provisions of either section 101(a)(15)(AXi) or (ii) or 101(a)(15)(G)(i) or (ii) of the Act, who has failed to maintain a status under any of those provisions, may apply to the Attorney General for adjustment of his status to that of an alien lawfully admitted for permanent residence.

(b) If, after consultation with the Secretary of State, it shall appear to the satisfaction of the Attorney General that the alien has shown compelling reasons demonstrating both that the alien is unable to return to the country represented by the government which accredited the alien or the member of the alien's immediate family and that adjustment of the alien's status to that of an alien lawfully admitted for permanent residence would be in the national interest, that the alien is

a person of good moral character, that he is admissible for permanent residence under the Immigration and Nationality Act, and that such action would not be contrary to the national welfare, safety, or security, the Attorney General, in his discretion, may record the alien's lawful admission for permanent residence as of the date [on which] the order of the Attorney General approving the application for adjustment of status is made.

8 U.S.c. § 12SS(b).

The plain language of Section 13 requires that an alien must fail to maintain diplomatic or semi-diplomatic status in order to be considered for adjustment of status under this section. Once the applicant establishes eligibility to apply by virtue of having had such status terminated, the criteria provided in part b of Section 13 are reviewed to determine if the applicant is eligible to be adjusted to lawful permanent resident status. An applicant for adjustment of status under Section 13 must not be maintaining diplomatic status at the time of applying for adjustment under Section 13. His or her status must be terminated prior to the date on which the adjustment application is filed.

Pursuant to 8 c.P.R. 214.2(a), an alien admitted under section 101(a)(IS)(A)(i) of the Act maintains that status "for the duration of the period for which the alien continues to be recognized by the Secretary of State as being entitled to that status." Thus, notwithstanding the evidence submitted by the applicant to show that his employment at the Embassy of Peru ended on August 1, 1992, the authority to determine the date of termination of status under section 101(a)(IS)(A)(i) of the Act rests exclusively with the State Department, and the State Department recognized the applicant as maintaining status under section 101(a)(IS)(A)(i) as of November 12, 1992. An application for adjustment of status under Section 13 filed while the applicant is maintaining diplomatic or semi-diplomatic status is properly rejected. However, rejection of the application on this ground does not preclude the applicant from filing a new application once the requirement for applying-failure to maintain status-has been met.

The applicant was admitted in A-I status on July 23, 1992, served thereafter as a Civil Attache, and was still maintaining that status as of November 24, 1992, as determined and reported by the State Department. *Letter from Chief of the Diplomatic Liaison Division, Visa Office, Department of State*, dated November 24, 1992. Therefore, notwithstanding the date on which the applicant's employment may have been formally terminated by the government of Peru, he maintained legal status in the United States under section 101(a)(IS)(A)(i) of the Act beyond November 12, 1992.

The AAO affirms its previous decision that the applicant was admitted to the United States in diplomatic status under 101(a)(IS)(A)(i) of the Act, was maintaining that status at the time of his application for adjustment, and therefore was not eligible to apply for adjustment under Section 13 at the time of filing. Pursuant to section 291 of the Act, 8 U.S.C. 1361, the burden of proof is upon the applicant to establish that he is eligible for adjustment of status. The applicant has failed to meet that burden. Accordingly, the application may not be approved.

ORDER: The prior decisions in this matter to deny the application are affirmed.